COMMISSION DECISION

of 9 March 2012

on State aid No SA.12522 (C 37/08) — France — Enforcing the *Sernam 2 Decision*

(notified under document C(2012) 1616)

(Only the French text is authentic)

(Text with EEA relevance)

(2012/398/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union (TFEU), and in particular the first subparagraph of Article 108(2) thereof ([1]),

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to those provisions ([2]),

Whereas:

1. PROCEDURE

1.1. GENERAL PROCEDURAL CONTEXT

(1) On 23 May 2001, the Commission approved aid for the restructuring of SCS Sernam (limited partnership), which became Sernam SA in December 2001 ('the Sernam 1 Decision') ([3]).

(2) On 20 October 2004, the Commission adopted a final decision in which it confirms that the aid approved under the Sernam 1 Decision, amounting to EUR 503 million, is compatible with the internal market under certain conditions ('the Sernam 2 Decision') ([4]). This Decision also establishes the presence of supplementary aid amounting to EUR 41 million which is incompatible with the internal market, to be recovered by France.

(3) By letter dated 24 June 2005, a first third party ('the first complainant') complained about the incorrect application of the Sernam 2 Decision ([5]).

(4) On 22 February 2006, this first complainant also brought proceedings for failure to act against the Commission, in so far as the latter, at the time, had taken no action on the complaint.

(5) By letter dated 10 April 2006, a second interested party, the Mory Group company ('the second complainant') also complained to the Commission ([6]).

(6) The two complainants essentially considered that the Sernam 2 Decision had been incorrectly applied and asked the Commission to initiate a new formal investigation procedure on the application by France of the Sernam 2 Decision.

(7) By letter dated 16 July 2008, the Commission informed France of its decision to initiate the procedure provided for in Article 108(2) TFEU concerning the application by France of the Sernam 2 Decision ('the opening decision'). The Commission in particular expressed doubts as to the compatibility with the Sernam 2 Decision of France's chosen arrangements purportedly to apply this Decision, and the possibility that these arrangements involve new State aid.

(8) This Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ([7]). The arguments of the two complainants are summarised in recital 16 of that decision. By means of the same decision, the Commission called on interested parties to submit comments on the application by France of the Sernam 2 Decision.

(9) On 8 October 2008, the French authorities presented comments on the opening decision.

([1]) With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union (TFEU). The two sets of provisions are, in substance, identical. For the purposes of this decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

([2]) OJ C 208, 14.7.2011, p. 8.

([3]) Decision of 23 May 2001 concerning State aid case NN122/00 (ex NJ 140/00), OJ C 268, 22.9.2001, p. 15.

([4]) Decision of 20 October 2004, OJ L 140, 29.5.2006, p. 1.

([5]) This complaint was supplemented in particular by letters dated 13 July, 25 August, 6 September, 5 October, 25 October and 16 December 2005.

([6]) This complaint was supplemented in particular by correspondence dated 23 April 2007.

([7]) OJ C 4, 9.1.2009, p. 5.

(10) The Commission received comments on this matter from interested parties. The first complainant submitted comments on 13 November 2008, the Société nationale des chemins de fer ('SNCF') on 6 February 2009, and the investment fund Butler Capital Partners ('BCP') on 9 February 2009. The Commission forwarded the comments received to France on 25 March 2009, asking it to comment, which the French authorities did with respect to the first complainant's comments on 7 May 2009.

(11) On 15 March 2011, the second complainant served notice on the Commission to implement 'investigation measures' for the purposes of verifying the conditions of application of the Sernam 2 Decision. The Commission replied to this on 18 May 2011, indicating the investigation measures taken since the adoption of the opening decision.

(12) On 25 November 2009 and 29 November 2011, the Commission sent requests for information to the French authorities. Replies were received on 15 January 2010 and 25 January 2012 respectively.

1.2. NATIONAL PROCEDURAL CONTEXT

(13) On 3 January 2007, the Mory group company asked the French authorities to issue two repayment orders: (1) one against Sernam SA concerning the EUR 41 million aid declared to be incompatible with the common market by the Sernam 2 Decision and which, in its opinion, had not in fact been recovered by France and (2) the other against the (undesignated) beneficiary of aid for restructuring Sernam SA allegedly granted by France with a view to the Sernam SA asset transfer operation (for the details of this operation, see section 2.4 of the present decision).

(14) The Minister for the Economy, Finance and Industry rejected the requests made by the second complainant by letter. The Mory group company appealed against this rejection decision on grounds of *ulta vires* before the Paris Administrative Court. As far as the Commission knows, this litigation is still pending.

(15) In addition, compulsory administration proceedings were brought on 31 January 2012 against the company Sernam Xpress ('Sernam Xpress'). Sernam Xpress is the company which received the assets and non-financial liabilities from Sernam SA at the time of the Sernam SA asset transfer operation (for the details of this operation, see section 2.4). The Nanterre Commercial Court ordered an observation period of six months and arranged a new hearing for 27 March 2012.

2. **DESCRIPTION**

2.1. SERNAM

(16) Since it was set up in 1970 as part of SNCF, Sernam's activities have consisted in mail and express parcel and pallet delivery services ([8]).

(17) On 1 February 2000, all Sernam's business activities were assigned to a subsidiary and SCS Sernam (limited partnership) was thereby formed. SCS Sernam was transformed into a public limited company (Sernam SA) on 21 December 2001. In 2005, Sernam SA had 10 operating subsidiaries and a road transport service company, Sernam Transport Route.

(18) On 17 October 2005, Sernam Xpress received the assets and non-financial liabilities of Sernam SA on the transfer of Sernam SA's activities to Financière Sernam (for the details of this operation, see section 2.4). Sernam Xpress was at the time a wholly-owned subsidiary of Financière Sernam.

(19) During 2006, BCP took a 51,8 % stake in the capital of Sernam Xpress. At the same time, Sernam Xpress acquired the company Coulonge, a transport firm established in Limoges.

(20) During 2011, the companies Financière Sernam and Sernam Xpress found themselves obliged to recapitalise before the end of the financial year. Since BCP did not contribute the necessary capital, two operations were undertaken.

(21) Firstly, in May 2011, Sernam Xpress contributed the Sernam brand to its operating subsidiary, Sernam Services (this contribution is valued at EUR 15 million).

(22) Secondly, on 30 June 2011, the company Sernam Xpress was wound up and the company Financière Sernam, the sole partner, absorbed its assets and liabilities (an operation referred to as the 'transfer of all assets and liabilities').

([8]) For a more detailed description of Sernam's activities, see recitals 12 to 31 of the Sernam 2 Decision and recitals 8 and 9 of the opening decision.

(23) Consequently, the Sernam group now consists of Financière Sernam and the subsidiaries of the ex-Sernam Xpress, which are Sernam Services, already mentioned, and the company Aster ('Aster'). Aster is the former company Sernam Transport Route. Sernam Xpress had sold this subsidiary in December 2005, and had granted a turnover guarantee to the purchaser. In March 2008, Sernam Xpress repurchased the company, which in the meantime had changed its name to Aster. At the time of the takeover, Sernam Xpress made a current account contribution of EUR 5 million to ASTER. This amount in current account was made over to ASTER during a board meeting held in July. In December 2011, Financière Sernam, which in the meantime had taken over Sernam Xpress (see recital 22), recapitalised the company ASTER by making over EUR 5 599 998, entered in its current account.

(24) Since the financial situation of the Sernam group continued to deteriorate, compulsory administration proceedings were initiated on 31 January 2011 against the companies Financière Sernam and Sernam Services. On 3 February 2011, the subsidiary Aster was put into liquidation with temporary continuation of business. The Nanterre Commercial Court ordered an observation period of six months and arranged a new hearing for 27 March 2012.

2.2. THE SERNAM 1 DECISION OF 23 MAY 2001

(25) In its Sernam 1 decision, the Commission authorised aid totalling EUR 503 million for restructuring SCS Sernam. The authorisation of this aid was based in particular on a commitment by France to sell the undertaking. 60 % of SCS Sernam's capital was to be taken over by Géodis SA ([9]), a transport and logistics company under general law quoted on the second market of the Paris Stock Exchange. In this way, Géodis SA should have become entirely liable for SCS Sernam's debts without limitation ([10]) and covered the additional costs of Sernam's restructuring up to EUR 67 million. In turn, SCS Sernam undertook to reduce the number of its operating sites from 107 to 72 over the period from 1999 to 2004, reduce its turnover by 18 %, reduce its staff and implement restructuring with the above-mentioned budget and within the prescribed timeframe, i.e. before the beginning of 2004.

2.3. THE SERNAM 2 DECISION OF 20 OCTOBER 2004

(26) In its Sernam 2 Decision, the Commission found that the aid amounting to EUR 503 millions authorised under the Sernam 1 Decision, was paid out on conditions differing from those provided for in the Sernam 1 Decision, in particular the takeover by Géodis of 15 % (instead of the envisaged 60 %) of the shares in SCS Sernam. Géodis also renounced contributing itself to the restructuring costs of the undertaking to the amount of EUR 67 million.

(27) In the light of these factors, the Commission imposed conditions on the authorisation of the EUR 503 million of restructuring aid paid to Sernam SA. Article 3 of the Sernam 2 Decision, which contains these conditions, is worded as follows:

'Article 3

1. Subject to paragraph 2, the following conditions shall be complied with:

(a) Sernam may develop only its activities to carry mail by railway in accordance with the Train Bloc Express (TBE) concept. In this regard, SNCF guarantees that it will offer to any other operator who so requests the same conditions as those granted to Sernam to develop TBE freight transport by rail.

(b) In return, Sernam shall, in the next two years as from the day on which this Decision is notified, fully replace its own road transport resources and services by road transport resources and services of one or more companies that are legally and economically independent of SNCF and are chosen in accordance with an open, transparent and non-discriminatory procedure.

Sernam's own road transport resources and services means all of the road resources — i.e. road transport vehicles — of the Sernam company of which it has full ownership or which it leases or rents.

The companies that take over Sernam's road activities shall perform the road transport services using their own resources.

2. In the event that Sernam sells its assets en bloc by 30 June 2005 at market price, through a transparent and open procedure, to a company that has no legal link with SNCF, the conditions of paragraph 1 shall not be applicable.'

(28) In the Sernam 2 Decision, the Commission also pointed out that the French authorities had paid additional aid amounting to EUR 41 million to Sernam. It considered this aid to be incompatible with the internal market and ordered its recovery by France.

([9]) For the record: Géodis was to acquire 60 % of Sernam against payment of a symbolic EUR 1 (see recital 51 of the Sernam 1 decision).

([10]) No limitation of liability in limited partnerships.

2.4. THE TRANSFER OF THE ACTIVITIES OF SERNAM SA TO FINANCIÈRE SERNAM

(29) For the purposes of implementing the Sernam 2 Decision, France claims to have respected the condition provided for in Article 3(2). It explains that SNCF, in a press release ([11]), invited any interested party to contact Bank ABN AMRO. Thirty-four industrial groups, financial groups or consortiums were allegedly invited to examine the file. The letters of invitation for the first round, sent by ABN AMRO to the parties which had requested the file, contain a call for tenders concerning the takeover of all the assets of Sernam SA.

(30) According to the French authorities, Sernam's economic situation failed to elicit any proposals based on a positive valuation. Apparently, all the offers submitted under this procedure concluded that the value was very negative:

— [candidate 1] (preliminary offer): EUR -120 million;

— [candidate 2] (preliminary offer): EUR -90,4 million;

— [candidate 3] (preliminary offer): EUR -90,4 million;

— [candidate 4] (second-round offer): EUR -65,2 million;

— [candidate 5] (second-round offer): EUR -56,4 million.

(31) In view of the absence of a firm offer, the Sernam SA management team, through a company still to be set up and initially called Bidco, then Financière Sernam, made a takeover offer.

2.4.1. **Effective date of the operations for the transfer of Sernam's activities to Financière Sernam**

(32) This offer was forwarded to SNCF on 30 June 2005 and accepted in principle by the SNCF General Management on the same day. However, formalities were necessary for the formal conclusion of the memorandum of understanding between all the parties involved. The memorandum of understanding between SNCF, Sernam SA, Sernam Xpress (one of the 10 wholly-owned subsidiaries of Sernam SA, set up in 2002) and the managers of the future company Financière Sernam, was signed on 21 July 2005 (hereinafter: the 'memorandum of understanding of 21 July 2005'). Financière Sernam was registered in the trade register on 14 October 2005. The various operations for the transfer of Sernam's activities to Financière Sernam, described in detail in the recitals below, were carried out on 17 October 2005.

([11]) Press release dated 24 November 2004.

2.4.2. **The various operations for the transfer of Sernam's activities to Financière Sernam**

(33) The French authorities indicated that the transfer of Sernam's activities to Financière Sernam took place in four stages:

(a) SNCF recapitalised its wholly-owned subsidiary Sernam SA to the amount of EUR 57 million;

(b) Sernam SA made a contribution to its wholly-owned subsidiary Sernam Xpress of all the assets, including the EUR 57 million from the recapitalisation described in point (a), and the liabilities of Sernam with the sole exception of the 'financial' liabilities (equity loan contracted by Sernam SA with the SNCF group, liability relating to the cancellation of the 'IBM-GPS' contract) amounting to EUR 38,5 million ([12]). In return for this contribution, Sernam SA received a share in Sernam Xpress with a nominal value of EUR 100;

(c) Sernam Xpress then undertook a capital increase of EUR 2 million which was underwritten in full by SNCF; following this operation, SNCF held the majority of the shares in Sernam Xpress;

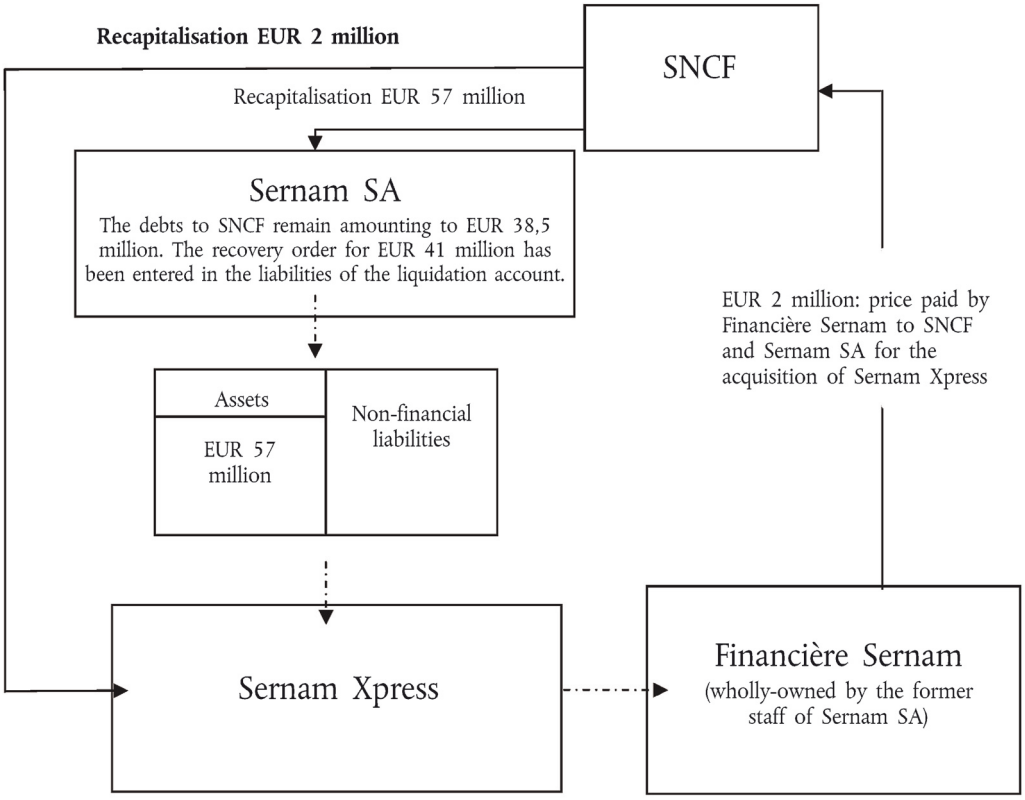
(d) Sernam SA and SNCF assigned to Financière Sernam, for a price of EUR 2 million, all their shares in Sernam Xpress, which represented the entire capital of the latter.

(34) Sernam SA was put into compulsory liquidation on 15 December 2005. The amount of EUR 41 million repayable to SNCF under the Sernam 2 Decision was entered in the liabilities of the liquidation account. ([13])

(35) The operations are shown in the following table:

([12]) The contribution by Sernam SA to Sernam Xpress was made under the French legal form of 'partial contribution of assets'.

([13]) Letter from the French authorities dated 7 May 2008, point 77.



(36) The memorandum of understanding of 21 July 2005, besides the recapitalisation by SNCF, of Sernam SA by EUR 57 million and of Sernam Xpress by EUR 2 million, provided for guarantees granted by SNCF to Financière Sernam (described in detail in recitals 72 to 85 of the opening decision) and a cancellation clause in the case of a negative decision by the Commission within five years following the conclusion of the memorandum of understanding (described in detail in recital 117 of the opening decision).

2.5. REASONS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

(37) In its decision of 16 July 2008, the Commission wished to verify whether France had in fact, as it claims, complied with Article 3(2) of the Sernam 2 Decision and whether the procedure for the recovery of the incompatible aid amounting to EUR 41 million chosen by France, i.e. entering the debt to the State in the liabilities of the liquidation account of Sernam SA, in fact enabled the distortion of competition caused by this aid to be eliminated. In addition, the Commission wished to check whether the operation transferring the assets of Sernam SA did not give rise to new State aid to be regarded as incompatible with the internal market.

2.6. COMMENTS BY INTERESTED PARTIES

2.6.1. **Comments by the complainants**

(38) Firstly, the first complainant considers that the conditions laid down in the Sernam 2 Decision for the sale of Sernam SA's assets were not complied with.

(39) To start with, it was alleged that the deadline imposed by the Sernam 2 Decision, i.e. 30 June 2005, to make the sale was not respected, as the transfer operations were approved only on 17 October 2005 and the sale of the shares should have occurred on the same day.

(40) Then, regarding the price of the transfer, the first complainant considers that it was set solely by reference to the offer made by Financière Sernam. This offer was purportedly unlawful as it implied the granting of new aid, and in particular the recapitalisation of Sernam SA. Finally, the first complainant emphasises that Sernam Xpress was not a company independent of Sernam SA, as shown by the Commission in its opening decision.

(41) Moreover, it is alleged that the transfer operations in reality constitute a share deal, i.e. the beneficiary entity is kept on the market with a mere change of owner.

(42) It also criticises the infringement of the condition of organising the sale through a transparent and open procedure. In its opinion, the sale of Sernam Xpress should have been subject to public consultation and invitation to tender after the dual recapitalisation of Sernam SA and Sernam Xpress, rather than that of Sernam SA.

(43) Second, the first complainant criticises manipulations in the valuation of the assets and liabilities transferred and the undervaluation of the entity sold.

(44) Third, the first complainant lists a series of measures which, in its opinion, constitute new aid: the recapitalisation of EUR 57 million, the non-recovery of the EUR 41 million in unlawful aid, the write-off of Sernam SA's financial debts to SNCF. All these measures, in its opinion, constitute aid which is incompatible with the internal market.

(45) Fourth, the first complainant emphasises that Sernam SA should have been wound up rather than sold. It shares the Commission's doubts that certain costs were taken into account in the calculation of the liquidation and considers that it is not shown at any time that the real cost of restructuring Sernam was less than that of liquidation.

(46) The first complainant concludes from this that the French authorities have not only eluded the obligation to recover EUR 41 million in aid declared to be incompatible, but have also granted new aid amounting to at least EUR 95 million, to which should be added various aid measures granted in the form of guarantees.

(47) The second complainant, for its part, did not submit comments on the opening decision.

2.6.2. **Comments by interested parties considering that the Sernam 2 Decision was duly complied with**

2.6.2.1. *Comments by SNCF*

(48) SNCF considers that it respected the condition provided for in Article 3(2) of the Sernam 2 Decision. It claims to have sold all of Sernam's assets en bloc, before 30 June 2005, at market price, to a company that has no legal link, through a transparent and open procedure.

(49) According to SNCF, the transfer operations were indissociable and simultaneous. The Commission could not therefore break them down artificially.

(50) It considers that in the case of a negative price, the principle of the private investor in a market economy would be respected if the cost of the transfer is lower than the cost of winding up, which the State would have borne as shareholder, and submits detailed observations to prove this.

(51) Finally, it emphasises that the obligation relating to the recovery of the aid amounting to EUR 41 million has been entered in the liabilities of the liquidation account of Sernam SA.

2.6.2.2. *Comments by Butler Capital Partners*

(52) Firstly, BCP provides details of its involvement in the capital of Sernam Xpress.

(53) Secondly, BCP specifies the objective pursued by the takeover of the company Coulonge.

(54) Thirdly, BCP denies that Sernam Xpress had a cash surplus following the capital injections of EUR 57 million and EUR 2 million. BCP would have had to reinject EUR 6 million to bring the cash flow to an acceptable level given the losses to be financed.

(55) Fourthly, BCP disputes that the benefit of the aid of EUR 41 million was transferred to Sernam Xpress. BCP considers that such a situation would be conceivable only if it were proved that the transfer of Sernam SA's activities was not made at market price. However, according to BCP, the transfer was made following an open, transparent and non-discriminatory procedure. BCP recalls too that the transfer process was accompanied by an expert valuation.

(56) Finally, regarding the consequences of its takeover of Sernam, BCP analyses the capital increase as a sale and considers that, in accordance with the *Banks* ([14]) and *SMI* ([15]) case-law, the recovery of hypothetical aid cannot be imposed on Financière Sernam or its subsidiary Sernam Xpress.

2.7. COMMENTS BY FRANCE

2.7.1. **Concerning compliance with the Sernam 2 Decision**

2.7.1.1. *Concerning observance of the deadline for the sale*

(57) The French authorities consider that the firm takeover offer, which is legally binding on the purchaser, was submitted on 30 June 2005 and accepted on the same day by SNCF, which made the agreement irrevocable under French contract law.

2.7.1.2. *Concerning the selling price*

(58) The French authorities consider that the Sernam 2 Decision did not prohibit sale at a negative price and that case-law recognises that this can constitute a market price.

(59) The assets were apparently sold at the negative price of EUR 57 million, corresponding to the amount of the recapitalisation of Sernam SA by SNCF. This price was allegedly better than the indicative offers initially presented and constituted the only firm offer proposed by the market to SNCF. It was purportedly endorsed by several independent valuations (ABN Amro, Oddo Corporate Finance/Paul Hastings and the French Privatisations Board).

(60) According to the French authorities, the prior recapitalisation undertaken by SNCF is merely an implementation arrangement. The Commission could not therefore refer to this recapitalisation to challenge the market value of the Sernam assets, since the existence of a market price precluded any categorisation as aid for the entire negative price.

2.7.1.3. *Concerning the sale of assets*

(61) The French authorities consider the Commission's analysis, according to which the transfer of Sernam SA's activities to Financière Sernam comprises two successive operations, i.e.: (1) an intra-group transfer of assets en bloc from Sernam SA to Sernam Xpress (at this stage a wholly-owned subsidiary of Sernam SA), then (2) a sale of Sernam Xpress to Financière Sernam, corresponding to a share deal and not to a sale of assets, to be artificial and unjustified.

(62) Firstly, the transfer operations were considered to correspond to a 'contribution and disposal operation' implemented through recapitalisation, i.e. an operation which is inextricably linked and undertaken for two reasons: (1) French law did not permit a sale of assets to be undertaken at a negative price, and (2) it was appropriate to ensure that the acquiring party has no legal link with SNCF.

(63) Since its economic situation continued to be in deficit (the cumulated losses of the four financial years prior to the disposal amounted to EUR 309,2 million), the total value of Sernam SA's assets would have been negative.

(64) To comply with the prohibition of a sale at a negative price under French law and to ensure the economic neutrality of the disposal operation, it is customary for practitioners in the case of negative value of assets to be transferred (1) to provide that the price paid by the purchaser is symbolic and (2) to set up an arrangement intended to compensate the purchaser (either participation by the seller in a capital increase prior to the disposal or write-off by the seller of debts owed to it by the transferred company).

(65) In addition, in order to avoid Sernam SA's creditors calling into question the validity of the operation or exercising their right to oppose it, it was appropriate for the assets en bloc to be accompanied by the liabilities necessary to continue Sernam's business. Merely selling the assets would not have allowed inclusion of these liabilities.

(66) It was therefore appropriate to undertake a partial contribution of assets subject to the regulations on divisions under Articles L.236-16 to L.236-21 of the French Commercial Code. In this respect, the French authorities specify that the contribution is equivalent to a sale in that it also entails a transfer of ownership, through remuneration by shares issued by the company in receipt of the contribution.

(67) As, pursuant to Article 3(2) of the Sernam 2 Decision, the acquiring party could have no legal link with SNCF, it was not possible to carry out the contribution of assets en bloc directly to Financière Sernam as, in this case, Sernam SA would automatically have become shareholder of Financière Sernam through the contribution. This would explain why there was a partial contribution of assets to Sernam Xpress then disposal of Sernam Xpress to Financière Sernam.

([14]) Case 390/98 *Banks* v *The Coal Authority* [2001] ECR I-6117.
([15]) Case 277/00 *Germany* v *Commission* [2004] ECR I-3925.

(68) According to the French authorities, the partial contribution of assets to Sernam Xpress is not an intra-group transfer in any case, since Sernam Xpress is a 'shell company' used to accommodate the assets en bloc of Sernam SA for the sole purposes of permitting their simultaneous disposal to the acquiring party – the company Financière Sernam – and not to continue the business of the parent company. These assets were purportedly accommodated and contributed at their market value to Sernam Xpress for the purposes of carrying out the operation. In any case, the contribution of assets would have implied transfer of ownership, for which Sernam Xpress had issued a share with a nominal value of EUR 100. According to the French authorities, this share represents the price of the real value of the assets and liabilities contributed, once recapitalised to the amount of EUR 57 million.

(69) The French authorities enclosed with their comments in response to the opening decision the opinion of Nicolas Molfessis, Law Professor, according to which 'Under French law … SNCF would not be permitted to dispose of Sernam's assets directly en bloc to Financière Sernam; under the legal rules applicable, SNCF was obliged to set up a contribution and disposal operation to comply with the constraints imposed by the Commission:

— since French law makes no provision for the very concept of sale at a negative price, the operation could not be undertaken at market price, as imposed by the Commission, without prior recapitalisation;

— since French law makes no provision for the concept of the assignment of debt, and makes the assignment of contract conditional upon the prior agreement of all the contractors assigned, an agreement which is impossible to obtain in practice, the assignment of the operating liabilities necessary to continue the business called for recourse to the technique of the partial contribution of assets to overcome this obstacle. Recourse to the technique of the partial contribution of assets required the intervention of a company, Sernam Xpress, to comply with the condition of absence of legal link between the assignor and the assignee imposed by the Commission.

The arrangement put in place by Sernam must be assimilated to a disposal of the assets en bloc:

— The contribution and disposal operation, which is well-known in practice, has been assimilated by the Court of Cassation to a disposal of assets whenever indicators showed that the two operations were inextricably linked, since in the end their sole aim is the transfer of the assets;

— Such an inextricable link is perfectly obvious in the present case, since the various agreements signed between the parties very clearly show the will of the parties to regard the various operations as interdependent, and having the sole objective of the disposal of Sernam's assets to Financière Sernam.'

(70) According to the French authorities, Sernam SA's assets were sold en bloc to a company that has no legal link with SNCF, at a negative price corresponding to a market price, following negotiation of the disposal conducted in the context of an open, transparent, unconditional and non-discriminatory tendering procedure, in accordance with the conditions laid down in Article 3(2) of the Sernam 2 Decision.

2.7.1.4. *Concerning the open and transparent nature of the selection process*

(71) For the French authorities, the assertion that the file transmitted to potential buyers of Sernam SA's assets did not refer to the sale of Sernam Xpress but to the sale of Sernam SA's assets is materially incorrect. Moreover, the requirement of an open, transparent and non-discriminatory tendering procedure would not imply undertaking a new tendering procedure after the recapitalisation, since this is merely the direct result of the tendering procedure and the negative price resulting from it.

2.7.1.5. *Concerning legitimate expectations*

(72) The French authorities consider that by providing explicitly for the possibility to undertake the disposal of Sernam's assets en bloc, the Sernam 2 Decision gave rise to expectations on the part of SNCF and the French authorities based on the fact that they were authorised to proceed in this way. Initiating the State aid investigation procedure would therefore ignore the legitimate expectations that the French authorities had placed in the Sernam 2 Decision, especially as they had acted with total transparency in relation to the Commission, providing it with all the relevant explanations on the terms and conditions of this disposal.

2.7.2. **Concerning the alleged manipulations carried out at the time of the valuation of the assets and liabilities transferred from Sernam SA to Sernam Xpress**

(73) Concerning the alleged manipulations carried out at the time of the valuation, the French authorities firstly reject the discount of EUR 22 million purportedly made on the valuation of the assets. In fact, since the operation in question was a partial contribution of assets followed by a disposal, the accounting rules applicable required valuation not at net accounting value as the first complainant claims, but based on the current value of the assets and liabilities contributed. These values were

assessed in accordance with the market price or valuations by independent experts. The accounting rules in force were also applied for the valuation of the deferred tax credits. As regards the valuation of the brand portfolio, this was based on an estimate made by the European Commission on 23 May 2001 at the time of a contribution by SNCF to SCS Sernam.

(74) With regard to the valuation of the liabilities, the French authorities consider that only the liabilities necessary to continue the business of the company in receipt of the contribution were transferred. Moreover, in their view, the valuation of the badwill corresponds only to the entry in the accounts of the negative market value of EUR 57 million.

2.7.3. **Concerning the absence of obligation to recover the aid amounting to EUR 41 million from Sernam Xpress**

(75) The French authorities emphasise that the distinction between share deal and asset deal, which forms the basis for the Commission's arguments developed in the context of the *SMI* ([16]) and *CDA* ([17]) cases, is not relevant in the present case.

2.7.3.1. *Concerning the breakdown of the operation into intra-group transfer and share deal*

(76) For the reasons described in recitals 61 to 70, the French authorities consider that the operations for the transfer of the activities from Sernam SA to Financière Sernam do not constitute an intra-group transfer followed by a share deal, but a disposal of assets to a third party.

(77) In the alternative, they emphasise that the market price of Sernam Xpress would necessarily have taken into account the existence of the debt of EUR 41 million if the aid had been transferred. Under this assumption, the negative price would have been EUR 98 million (57 + 41). However, the negative price 'paid' – in reality received – by Financière Sernam was allegedly only EUR 57 million. Consequently, the seller would have saved EUR 41 million, but it is therefore the seller who would have kept the economic benefit of the aid. They refer in this context to the *Banks* judgment ([18]).

2.7.3.2. *Concerning compliance with the conditions of the CDA and SMI judgments*

(78) The French authorities maintain that, in its *CDA* judgment, the General Court considered that the fact that CDA continued the business of the undertakings which have benefited from aid does not, as such, prove the existence of an intention to evade the effects of a recovery order ([19]).

(79) The General Court specified that there was no intention to evade the effects of the recovery order in so far as a purchase price in line with the market was paid by CDA for the takeover of the company LCA's assets ([20]).

(80) According to the French authorities, since Sernam Xpress had acquired ownership of the assets and part of the liabilities from Sernam SA at their market value, this operation did not transfer to Sernam Xpress the actual benefit of the advantage generated by the granting of aid of EUR 41 million. Furthermore, the Commission cannot argue that, as a result of the takeover of its assets, Sernam SA remains like an empty shell from which it is not possible to secure repayment of the unlawful aid. Such an argument, already developed in the *CDA* judgment, was rejected by the General Court ([21]).

(81) The French authorities emphasise that the disposal of Sernam SA's assets en bloc was a possibility explicitly considered by the Commission. For SNCF, the fact of transferring Sernam's assets to a company en bloc, at market price, through an open and transparent procedure, could not therefore under any circumstances be considered an evasion.

(82) This is all the more compelling as the Commission itself apparently considered that such an evasion was ruled out 'where, in addition to taking place at the market price, the transfer of the beneficiary company's assets 'en bloc' is made as part of an unconditional procedure that is open to all the company's competitors' ([22]).

(83) Concerning the Commission's argument ([23]) that the operation not only allowed the assets to be sheltered as authorised by the *CDA* judgment, but also a structure to be created permitting the financing of new investments such as the takeover of the company Coulonge, it sufficed to observe that the acquisition of

([16]) Judgment *Germany* v *Commission* cited above in footnote 15.
([17]) Case T-324/00 *CDA Datenträger Albrechts* v *Commission* [2005] ECR II-4309.
([18]) ECJ judgment *Banks*, cited above in footnote 14, paragraph 78.
([19]) Judgment *CDA Datenträger Albrechts* v *Commission*, cited above in footnote 17, paragraph 98.
([20]) Judgment *CDA Datenträger Albrechts* v *Commission*, cited above in footnote 17, paragraph 99.
([21]) Judgment *CDA Datenträger Albrechts* v *Commission*, cited above in footnote 17, point 100.
([22]) Judgment *Germany* v *Commission*, cited above in footnote 15, point 70; Judgment *CDA Datenträger Albrechts* v *Commission*, cited above in footnote 17, point 73.
([23]) Recital 128 of the opening decision.

the company Coulonge Services by Sernam Xpress was carried out simultaneously with the takeover of Sernam Xpress by BCP and that Sernam Xpress was able to draw on the takeover by BCP by injection of new capital to undertake this acquisition.

(84) Consequently, contrary to the doubts expressed by the Commission, 'the third criterion' of the *CDA* judgment, as identified by the French authorities, is therefore also complied with.

2.7.4. **Concerning the new aid to Sernam Xpress and/or Financière Sernam**

(85) Concerning the existence of new aid in the memorandum of understanding of 21 July 2005 (recapitalisation of Sernam SA by SNCF amounting to EUR 57 million; recapitalisation of Sernam Xpress by SNCF amounting to EUR 2 million; guarantees granted by SNCF to Financière Sernam; cancellation clause), the French authorities consider that, where a sale took place at market price following a tendering procedure which was open and transparent and at a cost lower than the cost of winding-up, this does not include any aid components.

(86) In addition, the negative price presented by Financière Sernam allegedly corresponds to the estimates made by independent experts.

(87) Moreover, the French authorities specify that the cancellation clause was included in the memorandum of understanding of 21 July 2005 at the request of Financière Sernam and solely to protect it against the risk of a negative decision by the Commission. The French authorities consider that no disposal would have been possible without this type of clause and claim that the Commission did not call this clause into question in a previous case ([24]).

3. **ASSESSMENT BY THE COMMISSION**

3.1. REMINDER OF REASONING BEHIND ARTICLE 3 OF THE SERNAM 2 DECISION

(88) Firstly, the Commission recalls that the present procedure was initiated under Article 16 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([25]), as the Commission had received indications that France has misused the aid authorised, subject to conditions, by the Sernam 2 Decision, following the misuse of aid authorised, also subject to conditions, by the Sernam 1 decision.

(89) The Commission considers it appropriate to recall the reasons which led to it imposing the conditions provided for by Article 3 of the Sernam 2 Decision ([26]):

> '[…] taking account of the misuse of aid established above and the extension of the period of the restructuring plan, the Commission takes the view that Sernam should take a specific compensatory measure by permanently withdrawing from market segments with overcapacity so as to warrant approval of part of the aid at issue.
>
> The immediate consequence of granting State aid in markets with structural overcapacity or in decline is that a company that would have had to give up its business on account of the stated difficulties would be enabled to artificially occupy market shares for which there is a very strong demand, to the detriment of financially sound competing companies. Care should therefore be taken to avoid driving away financially sound competitors from the market to the benefit of those that appear to be unable to survive by their own efforts.
>
> Bearing this in mind, the Commission is of the opinion that Sernam should permanently withdraw from market segments with overcapacity, in this case the market segment of groupage/traditional mail carried by road.
>
> Even though Sernam has already started this withdrawal, the Commission believes that it is not enough and that such it should be sustained. The Commission therefore considers it necessary to impose conditions which (i) will enable Sernam to continue moving through innovative diversification towards a market segment to be developed (and therefore without overcapacity) and (ii) will make it possible to replace Sernam's services by services of other operators (which will have the effect of freeing up Sernam's market shares in these segments) in market segments with overcapacity or stagnation or in decline.
>
> […]
>
> The Commission also recalls that, if Sernam is sold in its entirety (assets and liabilities) as intended by the French authorities, the conditions of the decision (takeover of Sernam's road activities by other companies and diversification of its activities towards rail freight) should in any case apply. On the other hand, should Sernam sell its assets en bloc, the Commission recalls that the above two conditions concerning the company's restructuring will not apply

([24]) Decision of 8 July 2008 concerning the measures which France has implemented in favour of the Société Nationale Maritime Corse-Méditerranée (SNCM), OJ L 225, 27.8.2009, p. 180.

([25]) OJ L 83, 27.3.1999, p. 1.

([26]) Recitals 208 to 217 of the Sernam 2 Decision.

as Sernam will no longer operate in its current legal form and will cede its market shares to the independent acquiring party (which will de facto continue its activities with Sernam's assets).'

(90) The Sernam 2 Decision therefore considers two different sale scenarios for Sernam SA: sale of the whole of Sernam SA (assets and liabilities), and sale of the assets only. Under the first hypothesis, the company acquiring the assets and liabilities is subject to the conditions set out in Article 3(1) of the Sernam 2 Decision; under the second, these conditions do not apply.

(91) Furthermore, the broader context of the Commission's Sernam 1 and Sernam 2 Decisions should be recalled. Sernam SA, a constantly loss-making company, was the beneficiary of State operating aid, which was paid to it by its parent company, SNCF, and was necessary for the survival of the undertaking.

(92) It was necessary to put an end to the artificial survival of a company which was unduly occupying market shares when it was not competitive. This resulted, on the one hand, in the process of regular replenishment of the company Sernam by the State being brought to an end, and, on the other hand in the distortions of competition created by this replenishment having to either disappear or give rise to compensatory measures. In this way, the EUR 41 million of unlawful, incompatible aid granted to the company Sernam between 2001 and 2004 was to be recovered and compensatory measures were to be adopted releasing market shares in exchange for the EUR 503 million in restructuring aid.

(93) However, the Commission observes straight away that the way in which France intended to implement the 2004 decision is directly counter to the objectives thus pursued. In fact, the French authorities continued to grant operating aid, under cover of implementing this decision, and endeavoured to preserve the economic continuity of the undertaking without releasing market share and on the contrary trying to strengthen its competitive position.

(94) At this stage, it is appropriate to carry out a methodical examination of the means implemented by the French authorities to achieve their objectives.

3.2. MISUSE OF THE AID AUTHORISED BY THE SERNAM 2 DECISION

(95) The French authorities confirm non-compliance with the conditions set out in Article 3(1) of the Sernam 2 Decision. Consequently, the Commission can confine itself to verifying whether France complied with the conditions set out in Article 3(2) of the Sernam 2 Decision. As a reminder, this paragraph is worded as follows:

'In the event that Sernam sells its assets en bloc by 30 June 2005, at market price through a transparent and open procedure to a company that has no legal link with SNCF, the conditions of paragraph 1 shall not be applicable.'

(96) As will be shown below, France failed to comply with these conditions.

3.2.1. **The transfer of the activities was not completed by 30 June 2005**

(97) The observations of the French authorities and the first complainant show that, on 30 June 2005, the SNCF management only accepted the firm offer of Financière Sernam in principle. However, the memorandum of understanding which is binding on all the parties to the transaction was not signed until 21 July 2005 and the various transfer operations were carried out only on 17 October 2005.

(98) The Commission concludes from this that the transfer of the activities of Sernam SA to Financière Sernam did not take place by 30 June 2005 at the latest, even though this was a requirement under the Sernam 2 Decision. This reason alone would already suffice to conclude that France misused the aid authorised conditionally by the Sernam 2 Decision.

3.2.2. **The transfer of activities does not constitute a sale** ([27])

(99) A contract of sale under the legal systems of the Member States of the Union is based on principles developed in Roman law (*emptio venditio*). The sale consists in the transfer of ownership of a good against the payment of a price. This price, as the French Government emphasises in respect of French law, must be a positive price.

(100) A transaction by which the person wishing to transfer ownership of one or more goods offers money to the person who acquires them is not a sale, but a different type of contract.

(101) In the present case, SNCF paid EUR 59 million, by undertaking the recapitalisation of Sernam SA for EUR 57 million and of Sernam Xpress for EUR 2 million respectively, and granted various guarantees to Financière Sernam. The payment of EUR 2 million by Financière Sernam in favour of SNCF and Sernam SA neutralises the recapitalisation of Sernam Xpress, but not the other components of the transaction. Consequently, the contract concluded between SNCF and Financière Sernam cannot be termed a sales contract. For that matter, this is not disputed by the French authorities,

([27]) The Commission emphasises that the question of whether a contract can be termed a sale is independent of the question whether the conclusion of a contract corresponds to the conduct of a private operator.

which explain that the various operations for the transfer of the activities of Sernam SA to Financière Sernam do not constitute a sale as French law does not permit them to carry out a sale which would have led to this result.

(102) The Commission concludes that the contract concluded between SNCF and Financière Sernam is not a sale. For this reason too, Article 3(2) of the Sernam 2 Decision has not been observed as there was no sale. Consequently, France has misused the aid authorised conditionally by the Sernam 2 Decision.

3.2.3. **The transfer of the activities is not a sale of assts but a transfer of Sernam SA in its entirety (assets and liabilities)**

(103) Even if the transfer of the activities of Sernam SA to Financière Sernam did constitute a sale, compliance with Article 3(2) of the Sernam 2 Decision presupposes that this sale relates solely to the assets, and not to Sernam SA in its entirety (assets and liabilities). This results from recital 217 of the Sernam 2 Decision, cited at recital 89 of the present decision.

(104) As stated in section 2.4, the transfer of Sernam SA's activities by SNCF to Financière Sernam is based on the use by Sernam SA of its wholly-owned subsidiary, Sernam Xpress, to which Sernam SA's assets were transferred together with its liabilities, with the exception of some of its debts to its parent company, SNCF. Before this transfer, Sernam SA had been recapitalised by SNCF to the amount of EUR 57 million and this new capital was included in the assets transferred. Once the transfer had been made, Sernam Xpress was in turn recapitalised by SNCF to the amount of EUR 2 million. The Sernam Xpress shares were then sold to Financière Sernam for the same amount (EUR 2 million).

(105) As indicated in section 2.7.1.3, the French authorities justify this operation by the two-fold constraint of French law and the Sernam 2 Decision.

(106) They point out that the overall result of the operation is identical to that of the sale of the assets. It should therefore be assimilated to a sale of Sernam SA's assets en bloc within the meaning of Article 3(2) of the Sernam 2 Decision.

(107) The Commission comes to a different conclusion, for two reasons.

3.2.3.1. *The transfer consists in an intra-group transfer en bloc of the assets and liabilities, followed by a sale of shares (share deal) of the subsidiary which received them*

(108) The operation carried out by SNCF enabled Financière Sernam to acquire the shares of Sernam Xpress and therefore to undertake a sale of shares ('share deal').

(109) First, it is true that SNCF undertook an operation termed under French law, according to the French authorities, a 'partial contribution of assets' (in reality of assets and liabilities). However, even analysed in isolation, this operation could not be termed a 'sale of assets to a third party'. It took place for a negative price of EUR 57 million and does not therefore constitute a sale (see section 3.2.2). In addition, it relates not only to the assets, but also to the entire liabilities, with the exception of certain debts of Sernam SA to its parent company, SNCF. It was therefore a transfer of Sernam SA in its entirety (assets and liabilities) and not a sale of the assets only (also see section 3.2.3.2).

(110) Finally, this transfer was made to a wholly-owned subsidiary, i.e. Sernam Xpress, an *ad hoc* entity intended to receive Sernam SA's assets and liabilities for the sole purposes of itself being sold to Financière Sernam. Therefore this contribution was not made to a third-party undertaking independent of SNCF.

(111) Secondly, the Sernam Xpress shares were sold to Financière Sernam, which does not constitute a sale of assets to a third party either, but a transfer of shares or share deal (and therefore a transfer of the undertaking in its entirety).

(112) Consequently, none of the operations carried out by SNCF constitutes a sale of Sernam SA's assets en bloc to a company that has no legal link with SNCF and the conditions set out in Article 3(2) of the Sernam 2 Decision were not observed.

3.2.3.2. *The transfer is not limited to the assets, but comprises Sernam SA in its entirety (assets and liabilities)*

(113) Recital 217 of the Sernam 2 Decision, cited at recital 89 of the present decision, establishes a clear distinction between a sale of assets, on the one hand, and a sale of Sernam SA in its entirety (assets and liabilities), on the other. This recital clearly shows that if the French authorities were to undertake a sale of Sernam SA in its

entirety (assets and liabilities), as they intended at the time of the adoption of the Sernam 2 Decision, they were obliged to comply with the conditions set out in Article 3(1) of the Sernam 2 Decision.

(114) The result of the various transfer operations is that Financière Sernam, through its acquisition of Sernam Xpress, acquires Sernam SA's assets and liabilities in their entirety at the time of the adoption of the Sernam 2 Decision, apart from the following exceptions: on the one hand, the assets were boosted by the injections of EUR 57 million in favour of Sernam SA and EUR 2 million in favour of Sernam Xpress (also see section 3.2.4 of the present decision) and, on the other hand, the liabilities were reduced by the amount of the equity loan contracted by the company Sernam SA with the SNCF group, a liability relating to the cancellation of the 'IBM-GPS' contract, and the amount of the obligation to repay the incompatible aid amounting to EUR 41 million.

(115) However, these marginal adjustments cannot hide the fact that the bulk of Sernam SA's assets and liabilities were indeed transferred first to Sernam Xpress and then to Financière Sernam.

(116) The transfer of the business is not therefore a sale of assets, but a sale of Sernam SA in its entirety (assets and liabilities), barring a few exceptions. Consequently, and for this reason too, the conditions set out in Article 3(2) of the Sernam 2 Decision were not observed.

3.2.4. **The transfer is not limited to the assets owned by Sernam SA at the time of the Sernam 2 Decision, but were increased by EUR 59 million**

(117) On the assets side, the Commission also notes that the sum of EUR 59 million was added by the recapitalisations of Sernam SA and Sernam Xpress and that, at economic level, taking account of the payment of EUR 2 million by Financière Sernam, this addition comes to EUR 57 million. Such an addition to the assets is not authorised by Article 3(2) of the Sernam 2 Decision.

3.2.5. **The transfer of the business did not take place through a transparent and open procedure**

(118) The French authorities at first organised a transparent and open procedure. However, at the end of this procedure, SNCF had not received any binding offer.

(119) Following the failure of the transparent and open procedure, the contract concerning the various operations for the transfer of Sernam SA's business was concluded with Financière Sernam. Since the latter did not participate as such and in an autonomous manner in the transparent and open procedure, the transfer of the business finally did not take place through a transparent and open procedure.

(120) For this reason too, the conditions set out in Article 3(2) of the Sernam 2 Decision were not observed.

3.2.6. **The ultimate purpose of a sale of assets was not observed**

(121) Recital 217 of the Sernam 2 Decision explains the ultimate purpose of a sale of assets as follows:

> 'Sernam […] will cede its market shares to the independent acquiring party (which will de facto continue its activities with Sernam's assets).'

(122) The ultimate purpose of a sale of assets was therefore to cede market shares and Sernam SA's assets, and to allow a third party to use these assets. The sale of the assets therefore aimed to break off Sernam SA's economic activity.

(123) However, in the present case, Sernam SA was acquired in its entirety by its management, regrouped in the future Financière Sernam. The economic continuity is total; furthermore, the undertaking has been released from a significant part of its debt and received new capital amounting to EUR 59 million, of which EUR 57 million remains the economic responsibility of SNCF. Consequently, apart from the fact that the operation put in place does not comply with the conditions set out in Article 3(2) of the Sernam 2 Decision, it does not allow the objectives pursued by this decision to be attained either. On the contrary, it leads to strengthening of the economic entity which is liable to increase the distortions of competition that the measures imposed by the decision aimed precisely to allay.

3.2.7. **The arguments presented by France do not allow compliance with Article 3(2) of the Sernam 2 Decision to be shown**

(124) France's argument that the operations taken as a whole are equivalent to a sale of assets en bloc cannot be accepted. In fact, through its nature, the first characteristic of a sale of assets en bloc is that it is not based on a sale of shares. Consequently, the Commission cannot accept the argument that several different legal instruments (partial contribution of assets and liabilities, then share deal) are equivalent to a given legal instrument (sale of assets) since one of the legal instruments actually implemented is the negation of the legal instrument sought.

(125) Likewise, the argument that a direct sale of Sernam SA's assets to Financière Sernam is not possible under French law cannot be accepted. Firstly, it should be recalled that the Sernam 2 Decision left France two alternative means

of implementing this decision. Assuming that the sale of the assets proved inapplicable, the French authorities could always implement the decision by following the possibility provided for by Article 3(1) of the Sernam 2 Decision (confining of Sernam SA's own activities to carrying mail by railway, with the road transport subcontracted). Secondly, if the third-party creditors were really opposed to a sale at a negative price, Sernam SA could have been the subject of a collective procedure, which means that the sale of assets could have taken place under this procedure.

(126) Finally, if the French authorities were experiencing difficulties in implementing the Sernam 2 Decision, they should have recontacted the Commission to find a solution, in agreement with it, concerning other arrangements pursuant to the principle of sincere cooperation provided for in Article 4(3) of the Treaty on European Union (TEU). Although the French authorities did visit the Commission on 24 November 2004 and wrote to it officially on 21 December 2004 to inform it of the choice to sell the assets en bloc, without describing the key components, it should be stressed that at no time did France notify the Commission of any changes to the restructuring plan conditionally approved by the latter in the Sernam 2 Decision. On the other hand, section 3.2.3 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty [28] confirms that a Member State may not deviate from the restructuring plan without notifying and obtaining the prior approval of the Commission.

(127) The Commission never gave its approval to the transfer of Sernam SA's activities to Financière Sernam, implemented by France.

3.2.8. **Conclusion: France failed to comply with Article 3 of the Sernam 2 Decision and misused the aid of EUR 503 million**

(128) In conclusion, in the Commission's opinion, Article 3 of the Sernam 2 Decision was not respected. Consequently, the restructuring aid of EUR 503 million conditionally authorised by the Sernam 2 Decision was improperly used.

3.2.9. **The aid of EUR 503 million is incompatible with the internal market**

(129) Since the aid of EUR 503 million was used by the recipient in breach of the Sernam 2 Decision, it is not compatible with the internal market on the basis of this decision.

(130) According to the Court of Justice case-law, it is for the Member State to invoke the reasons for compatibility of aid. Since France has not invoked any reason for compatibility, the Commission concludes that the aid of EUR 503 million is incompatible with the internal market and must be recovered, together with interest from the date on which it was made available.

(131) This recovery must be made from Financière Sernam and its subsidiaries, and notably Sernam Services and Aster, which are currently continuing the economic activity which received the aid, previously engaged in by Sernam SA (now wound up) and then by Sernam Xpress (the assets and liabilities of which were absorbed by Financière Sernam following a transfer of all assets and liabilities). In fact, it is appropriate to consider, firstly, that Sernam Xpress took over all the assets and a portion of the liabilities from Sernam SA following a transaction which took place within the group. Sernam Xpress therefore continued the economic activity of Sernam SA (also see the detailed account in section 3.3). Then, on account of the transfer of all assets and liabilities, Financière Sernam is the legal successor to Sernam Xpress. Finally, Financière Sernam and its subsidiaries, and notably Sernam Service and Aster, are continuing the business of Sernam SA and Sernam Xpress and therefore continuing to benefit from the aid of EUR 503 million initially granted to Sernam SA.

3.3. THE RECOVERY OF THE AID OF EUR 41 MILLION

(132) The State aid of EUR 41 million which was to be recovered by France from its recipient under the Sernam 2 Decision has been entered in the liabilities of the liquidation account of the company Sernam SA.

(133) The French authorities consider that pursuant to Article 4 of the Sernam 2 Decision, the transfer of the activities of Sernam SA to Financière Sernam through a procedure that they term transparent and open has the consequence of confining the recovery obligation to the company Sernam SA only.

(134) Article 4 of the Sernam 2 Decision is worded as follows:

> 'Any partial or full sale of Sernam shall be effected at market price and through a transparent procedure that is open to all its competitors. Under these conditions, the Sernam company shall, if it continues to exist, be responsible for paying back the aid of EUR 41 million.'

(135) Article 4 draws a distinction according to whether or not there has been an interruption of Sernam's economic activity. In the case of the disappearance of this activity, recovery is not necessary from the parties who have acquired the assets at market price through a transparent and open procedure.

[28] OJ C 244, 1.10.2004, p. 2.

(136) The Commission notes moreover that in their case-law, the Court of Justice and the General Court attach decisive importance to these same factors.

(137) The *SMI* judgment ([29]) draws a distinction between two hypotheses in the case of the sale of the activities for which aid has been received, i.e. the sale of the shares of the undertaking, following which the undertaking that has benefited from aid retains its legal personality (share deal), and the sale of all or part of the assets of the undertaking to another undertaking, following which the assisted economic activity is no longer carried out by the same legal person (asset deal).

(138) As regards the share deal, the Court of Justice ruled that ([30]):

> '[…] where an undertaking that has benefited from unlawful State aid is bought at the market price, that is to say at the highest price which a private investor acting under normal competitive conditions was ready to pay for that company in the situation it was in, in particular after having enjoyed State aid, the aid element was assessed at the market price and included in the purchase price. In such circumstances, the buyer cannot be regarded as having benefited from an advantage in relation to other market operators (see, to that effect, Case 305/89 Italy v Commission [1991] ECR I-1603, paragraph 40).
>
> In the present case, the undertaking to which unlawful State aid was granted retains its legal personality and continues to carry out, for its own account, the activities subsidised by the State aid. Therefore, it is normally this undertaking that retains the competitive advantage connected with that aid and it is therefore this undertaking that must be required to repay an amount equal to that aid. […]'

(139) As regards the asset deal, the Court of Justice continues as follows ([31]):

> 'It is certainly possible that, in the event that hive-off companies are created in order to continue some of the activities of the undertaking that received the aid, where that undertaking has gone bankrupt, those companies may also, if necessary, be required to repay the aid in question, where it is established that they actually continue to benefit from the competitive advantage linked with the receipt of the aid. This could be the case, inter alia, where those hive-off companies acquire the assets of the company in liquidation without paying the market price in return or where it is established that the creation of such companies evades the obligation to repay that aid.'

(140) The same distinction is to be found in the *Seleco* judgment ([32]). In this judgment, the Court of Justice confirms that the Commission may be compelled to require that the recovery is not restricted to the original firm but is extended to the firm which continues the activity, using the transferred means of production, in cases where certain elements of the transfer point to economic continuity between the two firms. The Court also accepted the relevance of the following indicators to establish economic continuity: the purpose of the transfer (assets and liabilities, continuity of the workforce, bundled assets), the transfer price, the identity of the shareholders or owners of the acquiring firm and of the original firm, the moment at which the transfer was carried out (after the start of the investigation, the initiation of the procedure or the final decision) and, lastly, the economic logic of the transaction ([33]).

(141) It seems appropriate also to emphasise that the sales of assets in the *SMI* and *Seleco* cases were undertaken under collective proceedings, under the supervision of a court. They concerned only part of the assets of the undertakings subject to the collective proceedings. In addition, according to the Court, it was not established that they did not correspond to market conditions.

(142) The General Court analysed an asset deal in the *CDA* judgment ([34]) and in particular checked whether in the case in point there was evidence permitting the conclusion that the recovery order was being evaded through a partial sale of assets. The General Court considered that such an intention had not been established by the Commission in this case and that *CDA* did not retain the actual benefit of the competitive advantage connected with the receipt of the aid granted. The General Court based this finding on two matters of fact: the sale was confined to part of the assets, sold en bloc and proceeding in that way (i.e. sale en bloc) made it possible to obtain a higher sum than would have been obtained by selling the assets in question separately.

(143) It is therefore appropriate to examine the transfer of Sernam SA's activities to Financière Sernam in the light of the criteria developed by the Court of Justice and General Court in order to establish whether it is appropriate to extend the recovery to Financière Sernam and its subsidiaries, Sernam Services and Aster.

([29]) Judgment *Germany* v *Commission*, cited above in footnote 15.

([30]) Judgment *Germany* v *Commission*, cited above in footnote 15, points 80 and 81.

([31]) Judgment *Germany* v *Commission*, cited above in footnote 15, paragraph 86.

([32]) Regarding the share deal, see Case 328/99 *Italy and SIM 2 Multimedia* v *Commission*, and C-399/00 [2003] ECR I-4035, paragraph 83: *'it is correct that the sale of shares in a company which is the beneficiary of unlawful aid by a shareholder to a third party does not affect the requirement for recovery'*, for the asset deal, see paragraphs 66 to 85 of the same judgment.

([33]) Judgment *Italy and SIM 2 Multimedia* v *Commission*, cited above in footnote 32, paragraphs 77 and 78.

([34]) Judgment *CDA Datenträger Albrechts* v *Commission*, cited above in footnote 17.

(144) As regards firstly the transfer of all the assets and liabilities, with the exception of the three financial liabilities (equity loan contracted by the company Sernam SA with the SNCF group, liability relating to the cancellation of the 'IBM-GPS' contract; obligation to repay the incompatible aid of EUR 41 million), from Sernam SA to Sernam Xpress, the Commission points out that this transfer covered the undertaking in its entirety (see section 3.2.3). There is therefore economic continuity between Sernam SA and Sernam Xpress. This distinguishes the present case from the facts which gave rise to the *SMI*, *Seleco* and *CDA* judgments, which concerned the sale of only part of the assets. In addition, the transfer took place within a group. It took place after a final decision by the Commission ordering the recovery of the aid and its only economic logic is to allow the continuation of the Sernam SA's activities, without having to comply with the conditions imposed by Article 3 of the Sernam 2 Decision. All the criteria evidencing economic continuity within the meaning of the decision and the *Seleco* judgment are therefore met.

(145) The Commission points out incidentally that the transfer to Sernam Xpress does not correspond to market conditions. The transfer to Sernam Xpress was made at a negative price and is not the result of a transparent and open procedure (see section 3.2.5). To the negative price of EUR 57 million, which is perceived as operating aid enabling the losses of Sernam Xpress to be covered for the years from 2005 to 2008 ([35]), is added the write-off of Sernam SA debts to SNCF amounting to EUR 38,5 million (see recital 27). Finally, the Commission points out too that the liabilities remaining in Sernam SA are debts to third parties and not to SNCF. Through the capital injection of EUR 57 million, SNCF enabled Sernam Xpress, at least for the period from 2005 to 2008, to honour these debts in their entirety. If, on the other hand, SNCF had sold only the assets at a positive price, the debts of Sernam SA in relation to third parties would have been honoured only up to the proceeds from the sale. This is an additional indicator that the contractual balance between SNCF and Financière Sernam does not correspond to market conditions.

(146) It should also be pointed out that the negative price of EUR 57 million is higher than the best offer received during the unsuccessful tendering procedure which had been a negative price of EUR 56,4 million (second-round offer [candidate 5]).

(147) The transfer enabled Sernam Xpress to elude the recovery order for EUR 41 million imposed on Sernam SA, and enabled it to continue Sernam SA's activities without having to repay this aid and without having to comply with the conditions of Article 3 of the Sernam 2 Decision.

(148) For these reasons, the Commission concludes that the transfer of the activities from Sernam SA to Sernam Xpress had the consequence that Sernam Xpress continued to benefit from the competitive advantage linked with the receipt of the aid granted. In fact, there was economic continuity between the two companies and the transfer corresponds to an evasion of the recovery order imposed on Sernam SA.

(149) As explained in the *SMI* and *Seleco* judgments, the sale of shares in a company which is the beneficiary of unlawful aid by a shareholder to a third party does not affect the requirement for recovery from the recipient company. Consequently, the sale of the Sernam Xpress shares to Financière Sernam did not have the consequence of releasing Sernam Xpress from the requirement to repay the aid of EUR 41 million.

(150) Following the merger between Sernam Xpress and Financière Sernam, the obligation regarding recovery was transferred to Financière Sernam. Furthermore, the latter and its subsidiaries, and notably Sernam Services and Aster, are continuing the business of Sernam SA and Sernam Xpress and are therefore continuing to benefit from the aid of EUR 41 million initially granted to Sernam SA.

(151) Furthermore, for the reasons set out under point 3.4 below, the arguments inferred by the French authorities from the application of the principle of the private investor in a market economy must be discounted.

3.4. CONCERNING THE NEW AID GRANTED TO SERNAM XPRESS

(152) The memorandum of understanding of 21 July 2005 provides for a certain number of measures, which may constitute new aid (cf. recital 36 above). The Commission must check whether these measures constitute new aid and whether, if appropriate, this aid can be declared compatible with the internal market.

(153) According to the French authorities, all these measures conform to the principle of the private investor in a market economy. SNCF allegedly transferred the activities of Sernam SA to the company having submitted the best offer received during a transparent and open tendering procedure and this offer, even though it consists of a negative price, is purportedly less costly for the State as shareholder than the winding-up of Sernam.

([35]) Cf. report of ABN Amro forwarded by the French authorities and described in section 2.5.8.2 of the opening decision, p. 47.

(154) The Commission considers that in a situation of recovery of the aid, it is not appropriate to apply the private investor principle. On recovery of aid, the State acts under the obligations incumbent upon it under Union law and not as a State which is a shareholder.

(155) Furthermore, the Commission points out that Article 3(2) of the Sernam 2 Decision perceived the sale of assets as an equivalent to the compensatory measures imposed by Article 3(1). According to point 40 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty ([36]), the divestment of a loss-making activity cannot be considered as a compensatory measure. The negative price agreed between SNCF and Financière Sernam shows that a divestment of a loss-making activity is involved which cannot be the equivalent of a compensatory measure. In this case, the negative price corresponds to operating aid to the undertaking, which is therefore inherently ill-suited to reduce distortions of competition.

(156) Moreover, if the position maintained by France were to be accepted, France could evade its obligation to recover from Sernam SA and from any other company which continues its economic activity the aid of EUR 41 million, declared incompatible by the Sernam 2 Decision, and the aid of EUR 503 million used improperly. Such a result would be in flagrant contradiction with the case-law of the Court of Justice, according to which the Member State is required to recover the aid without delay, using all the legal means at its disposal, including seizure of the firm's assets and, where necessary, its liquidation if it is unable to repay the amounts in question ([37]).

(157) Acceptance of the position maintained by France would also lead to discrimination between a private undertaking and a public undertaking. Whereas the State would take measures for recovery from the private undertaking, where necessary going as far as its liquidation, the public undertaking could escape this fate on the sole condition that it proves to be cheaper for the State to sell it at a negative price rather than recover the illegal, incompatible aid it has received.

(158) For these reasons, the Commission considers that the principle of the private operator in the market economy cannot be invoked by France to have the measures provided for in the memorandum of understanding of 21 July 2005 escape the concept of State aid.

(159) It is therefore necessary to establish whether the measures in question conferred an advantage upon Sernam Xpress or Financière Sernam. Since these two undertakings merged subsequently, there is no need to distinguish between the advantages granted to one or the other. The three other criteria evidencing the presence of aid are met: the measures are granted from the resources of a public undertaking, SNCF; SNCF is an EPIC [industrial and commercial public undertaking] subject to very close scrutiny by the State; the granting of the advantage is therefore also imputable to the State. Since Sernam Xpress/Financière Sernam operate in road transport, which is open to competition within the Union, the advantage is liable to create distortions of competition and affect trade between Member States.

3.4.1. **Concerning the EUR 57 million capital injection by SNCF in Sernam SA**

(160) As a result of the EUR 57 million capital injection by SNCF in Sernam SA, Sernam SA received a considerable financial advantage which is not available to its competitors. This advantage was then transferred with the other assets and liabilities to Sernam Xpress.

3.4.2. **Concerning the EUR 2 million capital injection by SNCF in Sernam Xpress**

(161) As a result of the EUR 2 million capital injection by SNCF in Sernam Xpress, Sernam Xpress received a considerable financial advantage which is not available to its competitors. However, the Commission notes that SNCF received a payment of EUR 2 million from Financière Sernam, which neutralises the EUR 2 million capital injection, which consequently did not confer any advantage.

3.4.3. **Concerning the write-off of Sernam SA's debts to SNCF**

(162) As explained in recital 33, the transfer of Sernam SA's activities to Financière Sernam does not include two of Sernam SA's debts to SNCF amounting to EUR 38,5 million. By writing off these debts, SNCF grants an advantage for an equivalent amount to Sernam Xpress/Financière Sernam.

3.4.4. **Concerning the guarantees granted by SNCF**

(163) On the transfer of Sernam SA's activities to Financière Sernam, SNCF granted the following guarantees:

— It undertook to complete, within a fixed time limit, the development of a specific site (Valenton) necessary for the running of Train Bloc Express (TBE), on pain of a fine of EUR 1 million in the event of delay;

([36]) OJ C 244, 1.10.2004, p. 2.

([37]) Judgment *Italy and SIM 2 Multimedia* v *Commission*, cited above in footnote 32, point 69.

— It undertook to cover any increase in rent for the new operating sites, limited to a differential of a maximum of EUR 3 million;

— It extended by three years the right to return of […] railwaymen seconded within Sernam;

— It extended by three years a social protocol guaranteeing to […] Sernam employees re-employment within SNCF in the event of redundancy (by Sernam);

— SNCF guaranteed 'the continuity of the Train Bloc Express (TBE)' ([38]) and access to the TBE ([39]). In this connection, SNCF paid EUR 3 million to Sernam Xpress.

(164) The first two guarantees obviously confer an advantage on Sernam Xpress/Financière Sernam. In fact, in the absence of these two guarantees, Sernam Xpress/Financière Sernam would have had to bear the costs in question themselves.

(165) The TBE guarantees, in the Commission's view, significantly reduce the risk incurred by Sernam Xpress/Financière Sernam and therefore confer an advantage.

(166) According to France, the guarantee granted to the railwaymen would in fact benefit SNCF. In fact SNCF apparently posted a certain number of railwaymen within Sernam SA. These railwaymen, the cost of whom was borne by Sernam SA, apparently had the right to be reintegrated into SNCF on request. In the light of the fears to which privatisation could give rise, SNCF then extended the period during which the railwaymen could exercise this right with a view to avoiding their return *en masse* which would have been more onerous for SNCF.

(167) The Commission considers that in the absence of this guarantee, the railwaymen would have been very likely to have applied for reintegration in SNCF at the time of the transfer of the activities. Sernam Xpress would have had to replace them with new employees under private status. The Commission considers it likely that in this case the salary of these new employees would have been less high than that of the railwaymen, which would have offset the additional cost for Sernam Xpress resulting from their more limited experience or difficulties in recruiting a large number of new employees in a very short time.

(168) France considers the three-year extension of the guarantee of re-employment to be a personal right granted to certain employees by SNCF. Neither Financière Sernam nor Sernam Xpress were apparently parties to this agreement.

([38]) Recitals 72 to 74 of the opening decision.
([39]) Recitals 75 to 77 of the opening decision.

(169) The Commission does not concur with this analysis. In fact, this guarantee makes it more attractive to remain employed at Sernam Xpress during the period in question, without Sernam Xpress having to bear the slightest additional cost.

(170) The Commission concludes that the guarantees granted by SNCF in the memorandum of understanding of 21 July 2005, with the exception of the guarantee for the railwaymen, confer an advantage on Sernam Xpress/Financière Sernam.

(171) Whereas it is easy to put a figure on the value of the first three guarantees (EUR 1 million, EUR 3 million and EUR 3 million respectively), this is not the case for the guarantee of re-employment of employees. France should have established the salary increase that Sernam Xpress/Financière Sernam should have awarded to the employees in the absence of these guarantees to achieve the same objective.

3.4.5. **Concerning the selling price**

(172) In recital 164 of the opening decision, the Commission also considered the question whether the negative price 'paid' by Financière Sernam did in fact correspond to market value. In this respect, the Commission observes that in the meantime, the merger had taken place between Sernam Xpress and Financière Sernam, and that possible aid to Financière Sernam consisting in too high a negative price would not exceed the EUR 57 million of aid that Sernam Xpress received as new aid. Consequently, it is no longer necessary to decide on the question of possible aid to the purchaser.

3.4.6. **Conclusion on the presence of new aid**

(173) The measures provided for in the memorandum of understanding of 21 July 2005 described in the present section 3.4 constitute new aid for Sernam Xpress/Financière Sernam.

3.4.7. **Incompatibility with the internal market and recovery**

(174) According to the Court of Justice case-law, it is for the Member State to invoke the reasons for compatibility of aid. Since France invoked no reason for compatibility, the Commission concludes that this aid is incompatible with the internal market and must be recovered, together with interest.

(175) This recovery must be made from Financière Sernam and its subsidiaries, and notably Sernam Service and Aster, which are currently continuing the economic activity which received the aid, previously carried out by Sernam Xpress (merged with Financière Sernam).

3.5. CONCERNING THE CANCELLATION CLAUSE

(176) The memorandum of understanding of 21 July 2005 contains a cancellation clause in case of a negative decision by the European Commission within five years following the conclusion of the memorandum of understanding. This clause could also constitute new aid. However, in such a case, the remedy would consist in its inapplicability. Since the clause has not in fact been applied, this result has been achieved. There is therefore no need for further analysis of the clause in question.

3.6. CONCERNING LEGITIMATE EXPECTATIONS

(177) The argument put forward by the French authorities that the steps taken in good faith in relation to the Commission in accordance with their duty of cooperation (such as their visit to the Commission on 24 November 2004 and their letter of 21 December 2004), gave rise to legitimate expectations concerning the conformity of the transfer of Sernam SA's activities to Financière Sernam with the Sernam 2 Decision and Union law, cannot be accepted.

(178) In fact, the information communicated by France was confined to informing the Commission of the choice to sell the assets en bloc without describing the key components of the operation for the transfer of Sernam SA's assets. In particular, the information note of 21 December 2004 to the Commission is confined to indicating certain aspects relating to the organisation of the asset transfer procedure and its open and transparent nature, with a view to achieving a sale at market price by 30 June 2005.

(179) None of the following facts were brought to the Commission's attention:

(1) the fact that the planned disposal would be based on an intra-group transfer of the assets and liabilities to another legal entity (Sernam Xpress), followed by divestiture of that other entity (*share deal*);

(2) the fact that part of the liabilities would be transferred with the assets and that only the recovery order relating to the aid of EUR 41 million and the debts to the SNCF amounting to EUR 38,5 million will remain in the liabilities of Sernam SA;

(3) the fact that France was prepared to recapitalise Sernam SA and Sernam Xpress in the event of a takeover offer at a negative price.

(180) In the absence of information on these factors, it was not possible for the Commission to foresee how France finally implemented the Sernam 2 Decision. On the contrary, the note of 21 December 2004 gives the impression that the disposal would be carried out without distinction between the liabilities and at a positive price, since it indicates that 'as soon as the disposal has been carried out, the proceeds will be used to repay the liabilities of the legal person Sernam, including the incompatible aid, under normal national procedures'.

(181) Although, considering the negative nature of the prices offered for Sernam SA's assets, the possibility of recapitalisation (fact 3) arose only on receipt of the offers, at least the principle of a sale of the assets with part of the liabilities (fact 2) must in principle already have been known by France when it drew up its note of 21 December 2004. Be that as it may, the French authorities cannot claim the benefit of legitimate expectations without having voluntarily informed the Commission of these material facts on 21 December 2004 or later.

(182) Finally and above all, if the French authorities were experiencing difficulties in implementing the Sernam 2 Decision, they should have recontacted the Commission to find a solution, in agreement with it, concerning other arrangements pursuant to the principle of sincere cooperation provided for in Article 4(3) TEU. Section 3.2.3 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty [40] confirms that, in application of this general principle, a Member State may not deviate from the restructuring plan without notification and prior approval of the Commission.

(183) Furthermore, the Commission never gave any agreement of any kind on the transfer of Sernam SA's activities to Financière Sernam implemented by France.

(184) The Commission therefore concludes that neither France, nor the beneficiaries of the aid can invoke legitimate expectations of any kind.

4. **RECOVERY**

(185) The Commission has concluded that the conditions of the Sernam 2 Decision were not respected. Consequently, the aid measures authorised by the Sernam 2 Decision were implemented improperly within the meaning of Article 16 of Regulation (EC) No 659/1999. In the absence of France presenting reasons for compatibility of this aid, it is incompatible with the internal market. France must therefore take all necessary steps to recover this aid, together with interest.

[40] OJ C 244, 1.10.2004, p. 2.

(186) This aid comes to a total of EUR 503 million. It consists of various restructuring aid amounting to FRF 2 938 million or EUR 448 million. This aid is presented in Table 3 of the decision of 30 April 2003, the main components of which are shown in the table below:

	(FRF million)
Initial capital	44
Financing of losses 2000	698
Financing of losses 2001	252
Financing of restructuring: SNCF contribution	1 300
Financing of restructuring: equity loan from SNCF	250
Additional costs for railwaymen	394
Total restructuring aid	**2 938**

(187) To reach the amount of EUR 503 million, it is necessary to add the amount of aid paid under contracts for the transport of customer baggage and newspapers amounting to EUR 34 million and under contracts for supplies amounting to EUR 21 million.

(188) For further details, reference is made to the Sernam 1 decision of 23 May 2001.

(189) In order to undertake the effective and immediate recovery of the aid, the French authorities must supply each date on which aid was made available to the beneficiary ([41]). It is on the basis of this date that the interest on the sums to be recovered must be calculated for each measure on a compound basis pursuant to Chapter V of Commission Regulation (EC) No 794/2004 ([42]).

(190) Likewise, the aid of EUR 41 million already considered incompatible by the Sernam 2 Decision must be recovered, together with interest calculated using the same method.

(191) Finally, the recapitalisation of EUR 57 million, the write-off of Sernam SA's debts by SNCF amounting to EUR 38.5 million and the guarantees granted by SNCF on the transfer of Sernam SA's activities to Financière Sernam, with the exception of the guarantee granted to the railwaymen, also constitute State aid which is incompatible with the internal market. This new aid must be recovered, together with interest calculated using the same method. The Commission refers to recitals 171 and 189 of the present decision for the calculation of the amounts to be recovered.

(192) To establish the amount of aid to be recovered, France may take into account any sums received by SNCF under the liquidation of the company Sernam SA as repayment for the aid of EUR 41 million plus interest and/or the equity loan plus interest.

(193) In the event of SNCF having received a lump-sum repayment of all its claims, France will be able to take into account any amounts recovered by SNCF following the winding-up of Sernam SA only in proportion to the ratio between the amount of the first two aid measures recorded and the total amount of the debt entered in the liabilities of the company Sernam SA.

(194) These amounts, including that of the aid originally granted to Sernam SA and Sernam Xpress, must be recovered from Financière Sernam and its subsidiaries, Sernam Service and Aster, which are currently carrying out the economic activity in receipt of aid, previously carried out by Sernam Xpress (having merged with Financière Sernam) and, prior to this, by Sernam SA.

(195) There is in fact no doubt that Sernam Xpress and its operating subsidiaries Sernam Services and Aster continued the economic activity of Sernam SA, since this was precisely the objective of the transfer of Sernam SA's activities to Financière Sernam, implemented by France. Furthermore, it emerges from the case file that Sernam Xpress, Sernam Services and Aster did indeed continue to run the business which had received aid according to the current business plan of Sernam SA and with the same staff. Then, on 30 June 2011, Financière Sernam, the sole partner, dissolved the company Sernam Xpress and took over its assets and liabilities. Financière Sernam is therefore the legal successor of Sernam Xpress and its economic successor since it (Financière Sernam) currently holds and controls directly the operating subsidiaries Sernam Services and Aster. In addition, Financière Sernam and its subsidiaries, and notably Sernam Services and Aster, are continuing the business of Sernam SA and Sernam Xpress and therefore continuing to benefit from the aid. Furthermore, in May 2011, Sernam Services received a contribution of assets, with the transfer of the Sernam brand, which is valued at EUR 15 million, without paying adequate compensation. Aster, for its part, benefited in March 2008 from a contribution of EUR 5 million in current account, an amount which was assigned to it in July 2008, on the one hand, and was recapitalised in December 2011 by the assignment of EUR 5 599 998 in current account, on the other. These two subsidiaries therefore benefited from the aid initially

([41]) The figures indicated in the present decision have been rounded to the nearest million. The calculation of the interest, on the other hand, must be based on the exact amount under each aid measure.
([42]) OJ L 140, 30.4.2004, p. 1.

granted to Sernam SA and Sernam Xpress not only as companies belonging to the group and on account of the fact that they are continuing its business, but also on account of the transfer of certain assets or recapitalisation measures in their favour.

(196) It should be specified that Sernam SA itself stems from the transformation of Sernam SCS into a public limited company at the end of 2001 (on this subject, see Sernam 2 Decision, recital 11). Sernam SCS was therefore the original beneficiary of part of the aid in question.

(197) The company Financière Sernam and its subsidiary Sernam Services having been put into receivership on 31 January 2012, and Aster, subsidiary of Financière Sernam, having been put into compulsory liquidation on 3 February 2012, the French authorities are requested to determine the amount of the aid, together with interest, to be recovered as soon as possible so as to have it entered in the liabilities of these undertakings,

HAS ADOPTED THIS DECISION:

Article 1

1. The State aid of EUR 503 million, granted by France to Sernam SCS (which became Sernam SA) and approved by the Commission by Decision 2006/367/EC ([43]) was used improperly. It is incompatible with the internal market. This aid also benefited Sernam Xpress, as well as Financière Sernam and its subsidiaries, Sernam Services and Aster.

2. The State aid of EUR 41 million, granted by France to Sernam SCS and declared incompatible by the Sernam 2 Decision, also benefited Sernam Xpress, as well as Financière Sernam and its subsidiaries, and notably Sernam Services and Aster.

3. The recapitalisation of EUR 57 million of Sernam SA by SNCF, the write-off of Sernam SA's debts to SNCF amounting to EUR 38,5 million and the guarantees granted by SNCF on the transfer of the business of Sernam SA to Financière Sernam, with the exception of the guarantee granted to the railwaymen, constitute State aid which is incompatible with the internal market.

Article 2

1. France shall recover the aid referred to in Article 1 from Financière Sernam and its subsidiaries, Sernam Services and Aster.

2. The sums to be recovered shall bear interest from the date on which they were made available to the beneficiary until their actual recovery.

3. The interest shall be calculated on a compound basis pursuant to Chapter V of Regulation (EC) No 794/2004 of 21 April 2004.

Article 3

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.

2. France shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

3. In implementing this Decision, France may take account of any sums recovered by SNCF as a result of the winding-up of Sernam SA under the conditions set out above.

Article 4

1. Within two months of the date on which this decision is notified, France shall communicate the following information to the Commission:

(a) the date on which aid under each measure was made available to the beneficiary and the total amount (principal and interest) to be recovered from the beneficiary for each aid measure;

(b) a detailed description of the measures already taken and planned to comply with this Decision;

(c) documents showing that the beneficiary has been ordered to repay the aid.

2. France shall keep the Commission informed of the progress in the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and the interest already recovered from the beneficiary.

Article 5

This Decision is addressed to the French Republic.

Done at Brussels, 9 March 2012.

For the Commission
Joaquín ALMUNIA
Vice-President

([43]) OJ L 140, 29.5.2006, p. 1.